

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)	
)	Adversary Proceeding
ROBERT M. WELLS)	
(Chapter 7 Case <u>96-20897</u>))	Number <u>97-02087</u>
)	
<i>Debtor</i>)	
)	
)	
ROBERT M. WELLS)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
DENNIS OWENS, SR. and)	
GAIL OWENS)	
)	
<i>Defendants.</i>)	

MEMORANDUM AND ORDER

Plaintiff Robert Wells filed this complaint on October 13, 1997, alleging violations of 11 U.S.C. § 362(a) and 11 U.S.C. § 524(a). The case was tried on October 5, 1998. This Court has jurisdiction by virtue of 28 U.S.C. § 1334(b). This adversary action is a core proceeding under 28 U.S.C. § 157(b)(2). After reviewing the evidence submitted and the citation of applicable authorities submitted by counsel, I enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

During the winter of 1991-92, Debtor and Defendants entered into a business venture known as Skyline International. This business venture was organized to develop a biological agent which “eats” oil spills. The business plan also envisioned the restoration of boats and airplanes. Defendants invested in three boats, a 22 ft. Catalina, a 22 ft. Bristol Sailstar, and an Annapolis Tidewater, to be used in the operation of Skyline International and for investment purposes. In 1992-93, Debtor, Rob Wells, and Defendant, Gail Owens, sailed the Annapolis Tidewater to York River Yacht Haven, Yorktown, Virginia. Defendants invested \$6,500.00 in the venture and Debtor assumed the storage and docking fees for this boat. All parties had equal access to the boat and used it at their leisure.

In the winter of 1993, Debtor was hired to work at the Federal Law Enforcement Training Center (“FLETC”) and moved to the Brunswick area. Debtor also served in the United States Coast Guard Reserve at Tybee Island, Georgia. Believing that the area was a good place to continue the development of Skyline International, Defendants followed Debtor to the area. Debtor and Defendants moved the Catalina and the Bristol Sailstar to the Brunswick area. The parties agreed to leave the Annapolis Tidewater in Yorktown, Virginia, until such time as they could bring it to Brunswick.

During 1995, Debtor advised Defendants that he was having financial difficulty and could not continue paying the storage and docking fees on the boat still in Virginia. He

requested that Defendants help him move the boat from Virginia so that he could stop making the payments. Defendants owned a truck and trailer which was used to move the other boats to Georgia.

Defendants refused to help transport the boat from Virginia. Defendants admit that they knew Debtor was in financial straits and that he had not been making payments to the marina in Virginia. They also admit that they knew Debtor was contemplating filing bankruptcy to get some relief from his financial difficulties.

In late 1995, Debtor informed Defendants that he had paid the delinquent storage fees on the boat in Virginia and that he had no more money to pay any future storage fees. Debtor told Defendants that because they would not help him bring the boat to Brunswick, the boat and future storage were now their problems. Sometime in late 1995 or early 1996 the York River Yacht Haven seized the Annapolis Tidewater for past-due storage and docking fees.

On August 12, 1996, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Debtor also filed the required schedules with the petition and listed the debt owed to Defendants as unsecured.

Debtor failed to list any of the three sailboats as assets of his estate notwithstanding his joint ownership interest, explaining that he had already abandoned the two boats brought to Georgia to the Defendants, and believed that because the third boat had been

seized by the marina for past-due storage and dockage, he lacked any interest in the third vessel. He also failed to list York River Yacht Haven as a creditor in the case because he believed the seizure had extinguished his obligation.

Defendants were listed on the on the mailing matrix for Debtor's bankruptcy case and notice of the bankruptcy filing was mailed to their home address at 411 Oyster Road, Brunswick, Georgia 31525. Both Defendants admit actual knowledge of the filing of the Chapter 7 case by virtue of having received the notice of the 341 Meeting issued by the Court. Defendant Dennis Owens attended the creditors' meeting held on September 5, 1996.

After the commencement of the case and before the discharge was entered, Defendant Gail Owens tendered a promissory note to the Debtor which purported to obligate Debtor to repay his outstanding obligation to the Defendants. Gail Owens admits that she delivered the note to him, but states that she did so at Wells' request, that he never responded to the request and that neither she nor her husband ever pursued the matter. Defendant Dennis Owens also admits that he asked Debtor to sign the promissory note post-bankruptcy; however, this occurred in the context of conversations wherein the Debtor advised both Defendants that he was not listing the sailboats in his schedule of assets. The motivation for that omission is unclear, but following the filing of the bankruptcy and prior to entry of the discharge Debtor signed a document relinquishing any ownership or claim to the two vessels which had already been moved from Virginia to Georgia (Ex. D-2).

Taking all of this evidence into account it is impossible to determine whether the conversations over the signing of a promissory note, the omission of the boats from the schedules, and the signing of the relinquishment of any claim of the asset were fraudulent on the part of the Debtor. However, that is a matter for the Chapter 7 Trustee to investigate and determine if the estate has an interest in any of the vessels. What is clear is that during this period of time the Debtor and Defendants were operating in concert and in a cooperative manner either to rearrange, or to conceal, the nature of their business relationship and as such I do not find that any action of the Defendants amounts to a willful violation of the automatic stay of 11 U.S.C. § 362.

On November 18, 1996, a discharge order was issued in Debtor's case. Defendants admit to receiving a copy of the discharge order and reading it.

Subsequent to the discharge order, Debtor requested Robert M. Cunningham, his attorney, to contact Defendants concerning the consequences of collecting a discharged debt because of his concern that Defendants were pursuing collection activities. On February 5, 1997, Mr. Cunningham mailed a certified letter with a first class copy to Defendants requesting that they stop all collection actions and seek the advice of an attorney (Ex. P-10). The certified letter was returned to the office of Mr. Cunningham marked "unclaimed." However, Defendants admit receiving a copy of the same letter, mailed first class.

Mr. Owens called Mr. Cunningham regarding the letter he had received. Mr.

Cunningham again requested that the Defendants stop all efforts to collect the discharged debt and to seek the advice of an attorney.

Mr. Owens contacted attorney Richard H. Taylor after speaking with Mr. Cunningham and testified that he believed, based on his conversation with Taylor, that certain actions he subsequently took were legal. By affidavit, Mr. Taylor, testified that he met with Defendant Dennis Owens regarding the Wells Chapter 7 case, but did not accept representation or any fee. Richard Taylor further testified that he did not give Defendant Dennis Owens any legal advice relative to said case (Ex. P-9). I find that attorney Richard Taylor rendered no legal advice to Defendant Dennis Owens and did not agree to represent Mr. Owens regarding this matter.

On April 22, 1997, Mr. Owens filed a pro se civil complaint in the Magistrate Court of Glynn County, Georgia, Case No. 9701457, seeking \$3,700 in storage and transportation fees (Ex. P-2). On June 13, 1997, Debtor answered the civil complaint, by and through his attorney, denying all allegations and asserting that the alleged debt was discharged by the Chapter 7 bankruptcy (Ex. P-2).

A hearing in the civil action was held on September 17, 1997, before the Honorable Ernest B. Gilbert, Magistrate Court of Glynn County. Debtor spent significant time and money in preparing for the hearing, including arranging for William Orange to appear as an expert witness; however, Dennis Owens failed to appear and the case was dismissed by Judge

Gilbert.

On July 8, 1997, knowing that Debtor had asserted the position that the bankruptcy discharge had eliminated all obligations to Defendants, Defendant Dennis Owens filed a criminal warrant alleging theft by conversion (Ex. P-3). Debtor was subsequently arrested pursuant to this warrant and spent the better part of one day in jail. To add insult to injury, he was held in custody in uniform in view of individuals he had trained in his capacity as an instructor at the Federal Law Enforcement Training Center in Brunswick.¹

In connection with his defense of the civil and criminal actions instituted against him, Debtor has expended or incurred the following expenses. He paid approximately \$1,000.00 to attorney James A. Chamberlin, Jr., for handling the criminal defense. Chamberlin has quoted a fee of an additional \$1,000.00 to have Debtor's record expunged in order to clear his record and enable the advancement of his career. Debtor also incurred lost wages of approximately \$67.50 in attendance at the trial of the criminal matter. He was terminated from employment and lost wages for those four months at a base pay rate of \$1,780.00 per month, or a total of \$7,120.00. Further Debtor lost wages in attending this trial in the amount of \$67.50. Debtor testified that he had to take a minimum of 30 days official leave to attend this trial, and

¹ Mr. Owens admits to having used the criminal process in the past in order to collect a debt. On that occasion, a lady had given him a post-dated check. When Mr. Owens attempted to negotiate the instrument, it was returned for insufficient funds. Defendant testified that he obtained a criminal warrant to collect the debt.

lost \$150.00 for the month in hazardous duty pay, for a total of \$2,175.00.² Debtor also incurred attorney's fees in connection with the defense of the civil case and the prosecution of this adversary proceeding to Robert M. Cunningham, P.C., in the amount of \$5,065.10.

Both the civil and criminal actions were instituted by Dennis Owens. Defendant Gail Owens did not participate directly in the prosecution of either matter. Both the civil and criminal actions were prosecuted after the entry of the Debtor's discharge. Accordingly, the only issue for the Court is to determine the liability, if any, of Defendant Dennis Owens for a violation of the discharge injunction of Section 524.

CONCLUSIONS OF LAW

A petition filed under Title 11 of the United States Code operates as a stay, applicable to all entities "of any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title" 11 U.S.C. § 362(a)(6). "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h).

A "willful" violation of the automatic stay does not require a specific intent to violate the stay. In re Atlantic Bus. & Community Corp., 901 F.2d 325 (3rd Cir. 1990). For a

² Testimony that Debtor lost an entire month's leave in order to attend a one-day trial is difficult to reconcile with common sense. However, this testimony was not contradicted and the Court will not enter the realm of the speculative in finding any lesser amount of leave was lost.

violation of the automatic stay to be “willful” all that is required is that an entity engage in a deliberate act to violate the stay with the knowledge that the debtor has filed for bankruptcy relief. In re Washington, 184 B.R. 172 (S.D.Ga. 1995). The Bankruptcy Code provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional. Whether the party believes in good faith that he had a right to the property is not relevant to whether the act was willful or whether compensation must be awarded. Atl. Bus. & Community Corp., 901 F.2d at 329.

As stated previously, however, *supra* at 4-5, I find that with regard to the automatic stay, no action of the Defendants amounts to a willful violation. All pre-discharge acts of Defendants proven were ambiguous in nature or were carried out at the invitation of Debtor.

The discharge injunction is another matter, though. “A discharge in a case under this title operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor . . . “ 11 U.S.C. § 524(a)(2). Defendant Dennis Owens willfully violated Section 524 if he (1) knew that the discharge had been entered and that an injunction was invoked and 2) intended the actions which violated the stay. In re Hardy, 97 F.3d 1384, 1390 (11th Cir. 1996). I find that the conduct of the Defendant in this case meets this test, and that the actions of attempting to collect a discharged debt by filing a civil complaint in the Magistrate Court of Glynn County and swearing out a criminal warrant in the same court amount to a willful and intentional violation of the discharge injunction.

Having determined that Defendant violated the discharge injunction, the Court may act remedially to award sanctions pursuant to Section 524 or Section 105. I find that sanctions are authorized under the statutory contempt power of this Court. *See Hardy*, 97 F.3d at 1389. These sanctions may include coercive damages, compensatory damages, and attorney's fees. *Hardy*, 97 F.3d at 1390 (citing *Jove Eng'g, Inc. v. Internal Revenue Service*, 92 F.3d 1539 (11th Cir. 1996)). In light of the repeated, contemptuous, and outrageous acts of Defendant Dennis Owens, which occurred after, with actual knowledge of and in defiance of the discharge injunction, I hold that an award of damages is demanded.

Defendant Dennis Owens is therefore ORDERED to pay to Debtor Robert Wells the following amounts:

James Chamberlin attorney's fees	\$2,000.00
Lost wages attending criminal trial	\$67.50
Lost four months wages while terminated from employment	\$7,120.00
Robert Cunningham's attorney's fees	\$5,065.10
Lost wages to attend adversary trial (30 days minimum and \$150.00 hazardous duty pay)	\$2,175.00
TOTAL	<u>\$16,427.60</u>

As to additional damages requested by Debtor, this Court may not award

damages that are punitive in nature but may award ‘coercive’ damages in order to “(1) compensate the complainant for losses and expenses it incurred because of the contemptuous act, and (2) coerce the contemnor into complying with the court order.” Jove, 92 F.3d at 1559. Coercive damages include both actual out-of-pocket expenses incurred in protecting its automatic stay rights and severe monetary sanctions to induce the creditor to cease violating the discharge injunction. Id. The Jove court noted that:

[s]anctions imposed for civil contempt to coerce compliance "cannot be any greater than necessary to ensure such compliance" and may not be so excessive as to be punitive in nature. . . . Sanctions are coercive if they serve the complainant rather than vindicate some public interest. . . . Sanctions are also coercive if the contemnor has the ability to control the extent of the sanction.

Jove Eng’g, Inc. v. Internal Revenue Service, 92 F.3d 1539, 1559 (11th Cir. 1996) (citations omitted). On the facts of this case, I find the award of compensatory out-of-pocket expenses and attorney’s fees sufficient to serve the purpose of sanctions for contempt of the discharge injunction.

ORDER

In light of the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that judgment be entered in favor of Debtor and against Defendant Dennis Owens in the amount of \$16,427.60. IT IS FURTHER ORDERED that the case against Defendant Gail Owens be dismissed.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of January, 1999.